No. 15,558

In the

United States Court of Appeals

For the Ninth Circuit

CLIFFORD JEFFERSON,

Appellant,

vs.

HARLEY O. TEETS, Warden of the California State Prison at San Quentin, California,

Appellee.

Appellee's Brief

Appeal from the United States District Court for the Northern District of California, Southern Division

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STATEMENT OF THE CASE

On March 18, 1957, the appellant, CLIFFORD JEFFERSON, filed a petition for a writ of habeas corpus in the United States District Court, Northern District of California, Southern Division (CT 2). After a hearing at which oral argument was heard on behalf of the participants, Judge Louis E. Goodman denied the petition on April 16, 1957 (CT 76). Thereafter a certificate of probable cause was granted on April 26, 1957 (CT 84), and notice of appeal was filed on April 29, 1957 (CT 87).

STATEMENT OF FACTS

The petition for a writ of habeas corpus seeks to set asid a judgment of conviction under California Penal Cod § 4500 imposing the death penalty.

In the petition filed in the United States District Cour appellant alleged that the application of the Californi Penal Code § 4500 is wanting in due process and is violativ of the equal protection clause of the Fourteenth Amendmen of the United States Constitution.

Appellant alleged that he was not in fact a life-ter prisoner within the meaning of the California statute, an also made an attack upon the testimony of one of the wit nesses as being perjured.

ARGUMENT

I. The Petition Herein Filed.

The appellant herein has filed with this Court a rathe lengthy brief which when analyzed seems to reduce itsel to a challenge to the constitutionality of Penal Code § 450 upon the grounds that said section is violative of the du process and equal protection clauses of the Fourteent Amendment of the United States Constitution, and tha appellant was not in fact serving a life term. There ar other contentions set forth in the brief, none of which, how ever, in our opinion give rise to any federal question.

II. Penal Code Section 4500 Is Constitutional.

Originally enacted as Penal Code § 246 (Stats. 1901, pag 6) Section 4500 of the California Penal Code was the subjec of review with regard to its constitutionality in *People v*

Finley, 153 Cal. 59. The *Finley* case was reviewed by the United States Supreme Court in *Finley v. California,* 222 U.S. 28, and again approved. We consider both of these cases conclusive so far as any question of constitutionality is concerned under either state or federal constitutional provisions. The *Finley* case, 153 Cal. 59, gives a complete and enlightening discussion as to the need for such a statute and as to its validity:

> "As to the genesis and origin of this comparatively new section of our Penal Code, it has long been a part of judicial knowledge, of legislative knowledge, and indeed, of general knowledge, that convicts in penal institutions, undergoing sentences for life, constitute a most reckless and dangerous class. The conditions of their sentences destroy their hopes and with the destruction of hope all bonds of restraint are broken and there follows a recklessness leading to brutal crimes. These crimes became the more frequent as the impotency of the law to mete out adequate punishment for them was discerned. They were crimes of violence committed not alone against fellow inmates, but upon the custodians, officers, and guards of the institutions. The series of bloody and savage escapes and attempts to escape from the state prisons, which attempts were usually organized and headed by 'life-termers,' form a part of the history of our state. Indeed, it is known that at times the prison officials have deemed it wise to clothe the 'life-termers' in a characteristic garb, as a red shirt, that they might be the better watched throughout the day and the more readily picked out by the armed guards in cases of an emeute. Under this well-recognized condition of affairs it seemed expedient to the legislature to meet the situation by the enactment of section 246 of the Penal Code." (Page 61)

> "* * * The 'life-termers,' as has been said, while within the prison walls, constitute a class by them-

selves, a class recognized as such by penologists the world over.

"* * * It is concluded, therefore, that the classification in question is not arbitrary, but is based upon valid reasons and distinctions.

"Nor can it be said that the act in question is violative of the fourteenth amendment of the constitution of the United States. This amendment means simply that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons, or other classes, in the same place and under like circumstances. (Missouri v. Lewis, 101 U.S. 22.) Paraphrasing the language of the supreme court of the United States in Moore v. Missouri, 159 U.S. 676, [16 Sup. Ct. 179], we cannot perceive that appellant was denied the equal protection of the laws for every other person in like cases with him and convicted as he has been would be subjected to like punishment." (Page 62)

III. Petitioner Was Undergoing a Life Sentence at the Time He Assaulted Another Inmate.

All of the assertions of appellant have been raised and considered by the courts in other cases with a uniformly adverse effect to appellant's claims. The California Supreme Court in *People v. Jefferson,* 303 P.2d 1024 (see Appendix "A"), at 1026, had this same contention before it and disposed of it thusly:

> "At the time of the assault defendant was serving a sentence for murder in the second degree, which carries a punishment of from five years to life. (Pen. Code, § 190.) The Adult Authority may fix this sentence at a lesser term than life. However, at the time of the assault here involved it had not so acted. Therefore, under the settled law of this state defendant was undergoing a 'life sentence' when he committed the assault. (People v. Smith, 36 Cal. 2d 444, 445, 222 P.2d 719; People v. McNabb, 3 Cal. 2d 441, 444, 45 P.2d 334;

People v. Wells, 33 Cal. 2d 330, 334, 202 P.2d 53; People v. Finley, 153 Cal. 59, 62, 94 P. 248.)"

The question of sentence and the measurement thereof was first considered by the California Supreme Court in *In re Lee,* 177 Cal. 690. The *Lee* case held constitutional the indeterminate sentence law (Stats. 1917, p. 665, effective July 27, 1917), and stated at pages 693 and 694:

"* * * It has uniformly been held that the indeterminate sentence is in legal effect a sentence for the maximum term.

"* * * For the foregoing reasons the weight of authority is to the effect that indeterminate sentence laws do not violate constitutional provisions such as ours (article III, section 1), providing for a segregation of governmental powers into the three departments—legislative, executive, and judicial."

There then followed other cases, all of which came to the same conclusion as the *Lee* case, but perhaps the leading case was *People v. McNabb,* 3 Cal. 2d 441. At the time of McNabb's alleged violation of the then Penal Code § 246 he was undergoing sentence for robbery in the first degree, punishment of which was "not less than five years." Considering squarely the question of whether or not McNabb was at that time undergoing a life sentence, the court stated at page 444:

"* * * The maximum therefore is a life sentence, subject to be shortened by the action of the state board of prison terms and paroles, as provided by the provisions of section 1168 of the Penal Code. Until action is taken by said board fixing a shorter duration of imprisonment than life it is uniformly held 'that the indeterminate sentence is in legal effect a sentence for the maximum term. It is on this basis that such sentences have been held to be certain and definite, and therefore not

> void for uncertainty.' (In re Lee, 177 Cal. 690 (171 Pac. 958), citing many supporting cases.)"

On page 456 the court continues:

> "The only remaining question which merits consideration is the one most strongly stressed by appellants, to wit: were appellants 'undergoing a life sentence' at the time they committed the assaults? The authorities of this and many sister states which have an indeterminate sentence law similar to ours hold that a statute which prescribes a minimum sentence of not less than five years and with no maximum is in law a life sentence until and unless a court or executive board charged with the duty of fixing prison terms remits a portion of the life term. This question was definitely settled by In re Lee, 177 Cal. 690 [171 Pac. 958], in 1918 and has been the pronounced law of the state since. Every person is charged with a knowledge of its existence. The fact that section 246 of the Penal Code was adopted in 1901, at a time trial courts pronounced a fixed term of imprisonment, can in nowise affect the operation of the present rule of law as declared in In re Lee, supra."

See, also, *People v. Wells,* 33 Cal. 2d 330; *In re Cowen,* 27 Cal. 2d 637, at 648; *In re Quinn,* 25 Cal. 2d 799, at 800; *People v. Ralph,* 24 Cal. 2d 575, at 578; *People v. Jones,* 6 Cal. 2d 554, at 556.

IV. A Discussion of the Wells Case.

All of the cases heretofore cited are in our opinion most clear and complete in their holdings with reference to appellant's contentions. An almost exhaustive treatment, however, of the indeterminate sentence law and California Penal Code Section 4500 is contained in the so-called *Wells* litigation commencing with action in the State court and terminating finally in the federal courts.

By way of background Wells was convicted of having violated Section 4500 of the California Penal Code, having thrown a heavy crockery cuspidor and striking certain prison personnel with great force. Upon the automatic appeal from the sentence of death in *People v. Wells,* 33 Cal. 2d 330, the court reviewed Wells' status as a life prisoner. He at the time of throwing the cuspidor was serving time for violation of Section 4502 of the California Penal Code, the minimum term of which is five years, no maximum term being provided and none having been fixed by the Adult Authority. The court held at page 335:

> "* * * Therefore, under the settled law of this state, defendant was, in effect, 'undergoing a life sentence' within the meaning of section 4500. (People v. McNabb (1935), 3 Cal. 2d 441, 456-458 [45 P.2d 334]; People v. Williams (1945), 27 Cal. 2d 216, 219 [163 P.2d 441].) Defendant urges that the reasoning of the McNabb case is faulty and that the problem should be reexamined and the McNabb and Williams cases should be overruled."

Following a determination by the California Supreme Court, a habeas corpus action was commenced in *Ex parte Wells* (1950), 90 F. Supp. 855, in which the district court declined the action upon the ground that available state remedies had not been exhausted. Contained within the federal action in this same case, however, was a denial of certiorari (338 U.S. 836, 70 S.Ct. 43, 94 L.Ed. 510).

Pursuant to federal suggestion there came *In re Wells* (1950), 35 Cal. 2d 889 (221 P.2d 947), in which a writ of habeas corpus was sought and denied by the court which stated at page 892:

> "The People of the State of California, through their Legislature, established the nondiscretionary

punishment of death for the offense denounced by section 4500 of the Penal Code. (See People v. Finley (1908), 153 Cal. 59, 62 [94 P. 248]; Finley v. California (1911), 222 U.S. 28, 31 [32 S.Ct. 13, 56 L.Ed. 75].) Thereafter, the People, through their Legislature, gave to the Board of Prison Terms and Paroles, which agency by later legislation has become the Adult Authority, the power and duty to determine, within statutorily defined limits, the length of time of imprisonment of felons sentenced to a state prison on judgments not imposing the death penalty. (See In re Lee (1918), 177 Cal. 690, 693 [171 P. 958]; People v. Hale (1923), 64 Cal. App. 523, 535 [222 P. 148]; In re Northcott (1925), 71 Cal. App. 281, 284 [235 P. 458]; In re Collins (1926), 198 Cal. 508, 509 [245 P. 1089]; People v. Stratton (1934), 136 Cal. App. 201, 207 [28 P.2d 695].) As previously indicated it is well settled that the nondiscretionary death penalty applies to a felon who, while serving an indeterminate sentence with no fixed maximum term of years, commits an assault of the sort described in section 4500. (People v. McNabb (1935), supra, pp. 456-458 of 3 Cal. 2d; see also In re Quinn (1945), supra, p. 800 of 25 Cal. 2d; People v. Williams (1945), supra, p. 219 of 27 Cal. 2d; People v. Wells (1949), supra, p. 337 of 33 Cal. 2d.) As said in People v. McNabb (1935), supra, pp. 456-457, 'The authorities of this and many sister states which have an indeterminate sentence law similar to ours hold that a statute which prescribes * * * no maximum is in law a life sentence until and unless a court or executive board charged with the duty of fixing prison terms remits a portion of the life term.'"

Following the denial of the request for a writ of habeas corpus in *In re Wells* (1950), 35 Cal. 2d 889, the United States Supreme Court denied certiorari (340 U.S. 937). There then followed *Ex parte Wells* (1951), 99 F. Supp. 320, in which the court states at page 323:

"Whatever may be thought of the correctness of this construction of Section 4500, it must be accepted by this court. We are bound by the State Court's construction of the State statute. State of Minnesota ex rel Pearson v. Probate Court, 1940, 309 U.S. 270, 273, 60 S.Ct. 523, 84 L.Ed. 744; Neblett v. Carpenter, 1938, 305 U.S. 297, 302, 59 S.Ct. 170, 83 L.Ed. 182; Standard Oil Co. of Indiana v. State of Missouri, 1912, 224 U.S. 270, 287, 32 S.Ct. 406, 56 L.Ed. 760; West v. State of Louisiana, 1904, 194 U.S. 258, 261, 24 S.Ct. 650, 48 L.Ed. 965; Central Land Co. v. Laidley, 1895, 159 U.S. 103, 112, 16 S.Ct. 80, 40 L.Ed. 91; Iowa Central Ry. Co. v. State of Iowa, 1896, 160 U.S. 389, 393, 16 S.Ct. 344, 40 L.Ed. 467."

Following *Ex parte Wells* (1951), 99 F. Supp. 320, the case was considered in *Duffy v. Wells* (1952), 201 F.2d 503, by the Ninth Circuit Court of Appeals which reversed Judge Goodman's order. The court there held at page 505:

"It has long been established in California that the legislature intended that such a sentence is fixed for life, until the California Adult Authority acting under Section 5077 of the California Penal Code shall fix a shorter term. People v. McNabb, 3 Cal. 2d 441, 456, 458, 45 P.2d 334; People v. Williams, 27 Cal. 2d 216, 219, 163 P.2d 441; and People v. Wells, 33 Cal. 2d 330, 335, 202 P.2d 53.

* * * * * * *

"The district court's opinion ignores the fact that the California Supreme Court in the above cases has held that Section 4502 fixes the sentence at life imprisonment in the absence of the action of the Adult Authority and erroneously poses the question before it as follows:

" 'Does the selection, as a class, of state prisoners, *whose maximum sentence has not been administratively fixed,* for the exceptional penalty of Section

4500, violate the federal guaranty of due process and equal protection of the law?' (Emphasis supplied.)

"Here the maximum sentence of life imprisonment has been fixed not by the Adult Authority but by the legislative adoption of Section 4502, as construed by the above decisions of the California Supreme Court which are binding on the federal courts. State of Minnesota ex rel. Pearson v. Probate Court, 309 U.S. 270, 273, 60 S.Ct. 523, 84 L.Ed. 744; Neblett v. Carpenter, 305 U.S. 297, 302, 59 S.Ct. 170, 83 L.Ed. 182.

"The legislature, in enacting Section 4502, chose a rational classification of state criminals to whom the life sentence should apply. It is not a denial of equal protection of the law because there are other classes of state prisoners to whom it does or does not apply. Cf. Collins v. Johnston, 237 U.S. 502, 510, 35 S.Ct. 649, 59 L.Ed. 1071.

"Wells contends that there is an absence of due process because if the Adult Authority had not refrained from reducing the sentence so fixed from life imprisonment to a term of years, but so had acted, Penal Code Section 3022 permits it to do so without notice to him and without his participancy in propria persona or by counsel. This contention rests on the erroneous assumption that it is the law of California that the functions of the Adult Authority are judicial in character, to be performed under the due process requirements of the Fourteenth Amendment.

"The powers of the Adult Authority were formerly exercised by a State Board of Prison Directors. It is the law of California that the 'fixing of the term if imprisonment by the board [Adult Authority] is not judicial in its nature.' In re Weintraub, 61 Cal. App. 2d 666, 671, 143 P.2d 936, 939. The state as well may confine the power of reducing a sentence so fixed for life to the uncontrolled discretion of a nonjudicial

administrative body as it could leave to the Governor's uncontrolled discretion the exercise of his power of executive clemency."

The petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit, October 19, 1953, was denied (346 U.S. 861).

V. The Case of Appellant Considered Under the Criteria of Brown v. Allen, 344 U.S. 443.

So far as we can determine the same arguments which are now advanced to the federal court were presented for decision to the State Supreme Court on the automatic appeal from the death penalty in *People v. Jefferson,* 47 A. C. 442 (303 P.2d 1024) (see Appendix). The claimed unconstitutionality of California Penal Code § 4500 as violative of the due process and equal protection clauses of the Fourteenth Amendment of the United States Constitution was rejected. The contention that defendant was not undergoing a life sentence was rejected. The question of prejudicial error in instructions; the sufficiency of the evidence; the refusal of certain instructions; the treatment of the motion for a new trial on the basis of newly discovered evidence—all of these things were fully considered by the highest state court, and after due consideration the judgment and order of the trial court were affirmed. We do not consider that this Court has jurisdiction to grant any relief on the basis of *Brown v. Allen, supra.* The applicability of the Fourteenth Amendment to the United States Constitution has been rejected not only by the State court but also by the United States Supreme Court in *Finley v. California,* 222 U.S. 28. As to the question of life sentence, as stated by the court in *Duffy v. Wells,* 201 F.2d 503, at 505:

"Here the maximum sentence of life imprisonment has been fixed not by the Adult Authority but *by the legislative adoption of Section 4502,* as construed by the above decisions of the California Supreme Court which are binding on the federal courts. State of Minnesota ex rel. Pearson v. Probate Court, 309 U.S. 270, 273, 60 S.Ct. 523, 84 L.Ed. 744; Neblett v. Carpenter, 305 U.S. 297, 302, 59 S.Ct. 170, 83 L.Ed. 182."

Inasmuch as this matter has been fully considered by the California Supreme Court, we consider this language in *Brown v. Allen,* 344 U.S. 443, at 465, as being decisive:

"* * * As the state and federal courts have the same responsibilities to protect persons from violation of their constitutional rights, we conclude that a federal district court may decline, without a rehearing of the facts, to award a writ of habeas corpus to a state prisoner where the legality of such detention has been determined, on the facts presented, by the highest state court with jurisdiction, whether through affirmance of the judgment on appeal or denial of postconviction remedies."

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(Appendix Follows)

Appendix

Decision of the California Supreme Court, December 4, 1956, in The People of the State of California, Respondent, v. Clifford Jefferson, Appellant, 47 A.C. 442; (303 P.2d 1024):

This is an automatic appeal from a judgment of guilty of violating section 4500 of the Penal Code (assault with a deadly weapon by a prisoner undergoing a life sentence in a state prison)[1] after trial by a jury. There is also an appeal from the order denying defendant's motion for a new trial.

On September 13, 1955, defendant, an inmate of Folsom State Prison undergoing a life sentence, assaulted with a deadly weapon another prisoner, Leonard Thompson.

QUESTIONS

First: Did the trial court err in denying defendant's motion to set aside the indictment?

No. Section 995 of the Penal Code provides two grounds for setting aside an indictment: "1. Where it is not found, endorsed, and presented as prescribed in this code. 2. That the defendant has been indicted without reasonable or probable cause."

Defendant contends that the trial court erred in failing to grant his motion to set aside the indictment because the foreman of the grand jury did not comply with the provisions of section 907 of the Penal Code.[2]

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1. Section 4500 of the Penal Code reads: "Every person undergoing a life sentence in a State prison of this State, who, with malice aforethought, commits an assault upon the person of another with a deadly weapon or instrument, or by any means of force likely to produce great bodily injury, is punishable with death."

2. Section 907 of the Penal Code reads: "Before considering a charge against any person, the foreman of the grand jury shall state to those present the matter to be considered and the person to be

Section 995, subdivision 1, of the Penal Code has been interpreted as applying only to those sections in part 2, title 5, chapter 1, of the Penal Code beginning with section 940. (*People v. Colby,* 54 Cal. 37; *People v. Kempley,* 205 Cal. 441, 447 (271 P. 478).)

In *People v. Kempley, supra,* this court held an indictment was not subject to attack under the provisions of section 995 of the Penal Code because of noncompliance with the requirements of section 907 of the Penal Code. It said at page 447: "The provisions of the foregoing section were not complied with; but the neglect or failure of the foreman to comply therewith is not made a ground for setting aside the indictment by section 995 of the Penal Code and section 907 contains within itself the penalty for the violation of its provisions."

This rule is applicable to the facts of the present case.

The record before the grand jury disclosed that Thompson was waylaid by three men, two of whom had knives. Defendant was one of the men who had a knife, and he inflicted knife wounds upon Thompson. From this evidence it appears that the requirements of section 995, subdivision 2, of the Penal Code were satisfied since there was reasonable ground for the grand jury's conclusion that defendant had violated section 4500 of the Penal Code. It is evident that the ruling of the trial court was correct.

Second: Is section 4500 of the Penal Code unconstitutional in that it results in a denial of due process of law and equal protection of the laws?

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charged with an offense in connection therewith, and direct any member of the grand jury who has a state of mind in reference to the case or to either party which will prevent him from acting impartially and without prejudice to the substantial rights of the party to retire. Any violation of this section by the foreman or any member of the grand jury is punishable by the court as a contempt."

No. This court has upheld the constitutionality of the statute in *People v. Berry,* 44 Cal. 2d 426, 430 (1) (282 P.2d 361), and *People v. Wells,* 33 Cal. 2d 330, 335 et seq. (2a)-(3) (202 P.2d 53).

Third: At the time of the assault was defendant undergoing a life sentence for murder in the second degree?

Yes. At the time of the assault defendant was serving a sentence for murder in the second degree, which carries a punishment of from five years to life. (Pen. Code, § 190.) The Adult Authority may fix this sentence at a lesser term than life. However, at the time of the assault here involved it had not so acted. Therefore, under the settled law of the state defendant was undergoing a "life sentence" when he committed the assault. (*People v. Smith,* 36 Cal. 2d 444, 445 (1) (224 P.2d 719); *People v. McNabb,* 3 Cal. 2d 441, 444 (1) (45 P.2d 334); *People v. Wells,* 33 Cal. 2d 330, 334 (1) (202 P.2d 53); *People v. Finley,* 153 Cal. 59, 62 (94 P. 248).)

Fourth: Was the evidence sufficient to justify a finding that defendant was "undergoing a life sentence?"

Yes. The custodian of records at Folsom State Prison produced a certified copy of the judgment and commitment under which defendant was held. This judgment of the Superior Court of Kern County, entered on the 20th day of May, 1949, showed that defendant was guilty of murder in the second degree and was sentenced to the state prison for the term prescribed by law.

The custodian testified that he acted as secretary for the Adult Authority at Folsom State Prison. He said the records disclosed the Adult Authority had not fixed any term for defendant.

In addition, defendant admitted he knew his term had not been fixed by the Adult Authority on the date of the assault.

This constituted substantial evidence to sustain the jury' finding that defendant was at the time of the assault "under going a life sentence." (See *People v. Wells,* 33 Cal. 2d 33(337-338 (4a)-(4b) (202 P.2d 53).)

Fifth: Did the trial court commit prejudicial error i instructing the jury as follows:

"Section 5077 of the Penal Code of California provide: so far as pertinent in this case, that the fixing of sentence shall be determined by the Adult Authority.

"Every prisoner confined in a state prison of the State c California for a term, the maximum of which is life, is i legal effect, serving a life sentence in such state priso until and unless his term is legally reduced to a term les than life.

"A violation of Penal Code, Section 187, to wit, Murde of the Second Degree, is punishable by a term the maximu of which is life imprisonment.

"If, therefore, you find from the evidence, to a moral ce tainty and beyond a reasonable doubt that the defendan Clifford Jefferson, was, on the 13th day of September, 195 legally serving a sentence in the state prison of the State c California at Folsom, for a violation of Penal Code Sectio 187, murder of the second degree, and that his term had no prior to said date, been reduced to a term of less than lif it is your duty to find that the said defendant, Cliffor Jefferson, was then and there serving a life sentence an you should so find."

No. The instructions did not take from the jury the ques tion: Did it believe from the evidence that at the time of th assault defendant was serving a sentence for murder in th second degree, the term for which had not been fixed by th Adult Authority? This was the extent of the factual determ nation to be made by the jury. The length of the punishmen

imposed by statute for second degree murder was one to be given to the jury by the court as a matter of law. The instruction was correctly stated and finds full support in *People v. McNabb, supra; People v. Wells, supra;* and *People v. Berry,* 44 Cal. 2d 426, 430 (2) (282 P.2d 861).

People v. Oppenheimer, 156 Cal. 733 (106 P. 74), and *People v. Carson,* 155 Cal. 164 (99 P. 970), decided before the enactment of the indeterminate sentence law, are not applicable in this case.

Sixth: Did the trial court err in refusing to give instructions requested by defendant relating to lesser included offenses?

No. Defendant contends that the trial court committed prejudicial error when it refused to give his proposed instructions (a) relating to lesser offenses, (b) relating to included offenses or attempts, and (c) defining "assault."

In *People v. Finley,* 153 Cal. 59, 63 (94 P. 248); *People v. Carson,* 155 Cal. 164, 175 (99 P. 970); and *People v. Oppenheimer,* 156 Cal. 733, 737 (106 P. 74), decided under Penal Code, section 246 (the predecessor of section 4500 of the Penal Code), a contention similar to that made by defendant here was held untenable.

In *People v. Carson, supra,* at page 168, this court held that section 246 of the Penal Code, which read: "Every person undergoing a life sentence in the state prison of this state, who, with malice aforethought, commits an assault upon the person of another with a deadly weapon or instrument, or by any means or force likely to produce great bodily injury, is punishable with death," was not unconstitutional.

It held the section neither denied to a defendant the equal protection of the law guaranteed by the fourteenth amendment to the Constitution of the United States, nor contra-

vened the provisions of section 11 of article I of the stat Constitution declaring that all laws of a general nature shal have a uniform operation. (See also *People v. Finley,* 15 Cal. 59, 62 (94 P. 248); *People v. Quijada,* 154 Cal. 243, 24 (97 P. 689).)

When the Legislature enacted section 4500 of the Pena Code in the same wording as that in the former section 24 of the Penal Code, it presumably knew of the prior de cisions construing the section and thus used the same lan guage intending that it be given the same meaning. (*Peopl v. Berry,* 44 Cal. 2d 426, 430 (1) (282 P.2d 861); *People v Superior Court,* 118 Cal. App. 2d 700, 703 (2) (258 P.2 1087).)

Seventh: Was there a prejudicial variance between th charge in the indictment and the proof adduced?

No. The indictment was framed in the words of sectio 4500 of the Penal Code. The evidence disclosed that tw persons, Carter and defendant, assaulted Thompson wit knives, inflicting 14 or 15 wounds. Defendant was seen stab bing Thompson with *a knife* and running from the vicinit of the fracas to the Education Building. Two knives wit fresh bloodstains were found in the Education Building, on under a water cooler and the other in the drafting roon Thus, regardless of which knife defendant used, there wa substantial evidence to justify the jury's finding that one o them was used by him. From the evidence the jury coul have concluded which particular knife was used by defend ant in making the assault. There is, therefore, no varianc between the indictment and the proof.

Eighth: Did the trial court err in refusing to admit i evidence sections 190, 1168, 3020, 3023 *and* 5077 *of the Pena Code?*

No. Section 1823 of the Code of Civil Procedure defines "judicial evidence" as the means sanctioned by law of ascertaining in a judicial proceeding the truth respecting a question of fact.

Section 1875, subdivision 2, of the Code of Civil Procedure provides that courts will take judicial notice of "whatever is established by law." Thus under the code provisions and under the general rules of law, courts take judicial notice of the laws of the state. (*Peck v. Noee,* 154 Cal. 351, 353 (97 P. 865).)

Defendant's offer in evidence of copies of the above sections of the Penal Code was properly refused. These were not evidentiary matters to be submitted to the jury, but presented questions of law upon which the trial judge could instruct the jury if such instructions were proper under the evidence. The record disclosed that the jury was fully and properly instructed as to the law upon all issues presented to it.

Ninth: Did the trial court err in denying defendant's motion for a new trial on the ground of newly discovered evidence?

No. Affidavits of William Carter and Frank Williams in support of the motion purporting to exculpate defendant were filed. A counteraffidavit of Kenneth Wells was also introduced stating that William Carter had subsequently retracted his statement contained in the affidavit he had executed and which was offered by defendant.

The record discloses that counsel for defendant had full opportunity to present this matter at the time of the trial. Carter had already been convicted of being a participant in the same affray, and the evidence of Thompson on the stand disclosed that Williams was also a participant. Thus counsel for defendant was fully aware of the part these affiants

played in the commission of the offense and could have elicited testimony from them at the time of the trial.

Applications for a new trial based upon newly discovered evidence are addressed to the sound discretion of the trial court. In the absence of a clear showing of an abuse of discretion the trial court's ruling will not be disturbed on appeal. (*People v. Smith,* 36 Cal. 2d 444, 449 (224 P.2d 719); *People v. Ross,* 120 Cal. App. 2d 882, 889 (13) (262 P.2d 343; *People v. Parkinson,* 138 Cal. App. 599, 612 (4) (33 P.2d 18).)

It is clear that the trial judge disbelieved both the affidavits of Williams and Carter in support of the motion for a new trial. Since the question of weight and credibility to be attached to the affidavits was for the trial judge, defendant has failed to demonstrate any error or abuse of discretion.

The judgment and order are affirmed.

McComb, J.

Gibson, C. J.
Shenk, J.
Carter, J.
Traynor, J.
Schauer, J.
Spence, J.
Concurred.